

IT 97-6

Tax Type: INCOME TAX

Issue: Penalty Under 1002(d) - Failure To File/Pay Withholding
Timeliness of Protest (60-Day Limitation)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	
)	
v.)	No.
)	TYE: 4/Q/91 to
)	4/Q/92
TAXPAYER,)	
)	
Taxpayer)	SSN:
)	

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. John B. Truskowski, of Keck, Mahin & Cate for TAXPAYER; Mr. Thomas P. Jacobsen, Special Assistant Attorney General for the Illinois Department of Revenue.

Synopsis:

This matter comes on for hearing pursuant to the timely protest of the Notice of Deficiency ("NOD") issued by the Department on February 29, 1996 for withholding tax liability. This NOD was issued to TAXPAYER (hereinafter "taxpayer" or "TAXPAYER") as a responsible officer of CORPORATION pursuant to Section 1002(d) of the Illinois Income Tax Act. The issues to be resolved are 1) whether the taxpayer was a responsible officer of CORPORATION and thereby required to collect, truthfully account for and pay over the withholding tax and 2) whether the taxpayer willfully failed to

collect, truthfully account for and pay over such taxes for the fourth quarter of 1991 through the fourth quarter of 1992 (hereinafter "tax period").

A hearing was held on February 4, 1997. Upon consideration of all the evidence, it is recommended that this matter be resolved in favor of the Department.

Findings of Fact:

1. The Department's *prima facie* case, was established by the admission into evidence of the NOD which proposed an assessment of \$13,807.34. Dept. Ex. No. 1.

2. TAXPAYER was the president of CORPORATION. Dept. Ex. No. 3.

3. TAXPAYER signed the IL-941 tax returns for the first quarter of 1992 through the fourth quarter of 1992. Dept. Ex. No. 3.

Conclusions of Law:

The Department seeks to impose personal liability on TAXPAYER pursuant to Section 1002(d) of the Illinois Income Tax Act which provides:

Any person required to collect, truthfully account for, and pay over the tax imposed by this Act who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the amount of the tax evaded, or not collected, or not accounted for and paid over

35 ILCS 5/1002(d) (formerly Ill. Rev. Stat. 1991, ch. 120, 10-1002(d)).¹

Section 1002(d) is modeled after Section 6672 of the Internal Revenue Code, which imposes liability upon those individual persons actually responsible for an employer's failure to withhold and pay over the taxes. The Illinois Supreme Court has accepted that cases arising under section 6672 of the IRC provide guidance in determining liability under Section 13 1/2 of the Retailers' Occupation Tax Act ("ROTA"). See, e.g. Carl E. Branson v. The Department of Revenue, 168 Ill. 2d 247 (1995); Department of Revenue v. Heartland Investments, 106 Ill. 2d 19, 29 (1985). A comparison of Section 13 1/2 of the ROTA and 1002(d) of the IITA reveal that not only are the underlying policies of the two sections similar but the language of both sections encompasses responsibility and willfulness and therefore, a similar analysis may be made.

At hearing, the Department introduced the NOD into evidence. Section 904 of the IITA provides that the Department's determinations of tax liability shall be *prima facie* correct. It states in part:

If the Department finds that the amount of tax shown on the return is less than the correct amount, it shall issue a notice of deficiency to the taxpayer which shall set forth the amount of tax and penalties proposed to be assessed. ... The findings of the Department under this subsection shall be *prima facie* correct and shall be *prima facie* evidence of the correctness of the amount of tax and penalties due.

35 ILCS 5/904.

Furthermore, the court in Branson, 168 Ill. 2d 247 (1995), has affirmed that the NOD constitutes *prima facie* proof of all elements,

¹. The Uniform Penalty and Interest Act, 35 ILCS 735/3-7, which provides for a personal liability penalty, is effective for taxes incurred as of January 1, 1994.

including willfulness of the tax penalty. Thus after the NOD is admitted into evidence, the burden is on the taxpayer to rebut the Department's *prima facie* case. In the case at hand, taxpayer did not offer any documents into evidence, but asked that taxpayer's letters to the Department be considered. (Dept. Ex. No. 3). In the letters, TAXPAYER claimed he was not involved in the daily operations of the company and his duties only concerned sales, training and recruiting. Taxpayer also identified several people who were actively involved in the business operations, yet did not offer their testimony to prove that a clear separation of duties existed within the company. TAXPAYER's letter dated June 23, 1995, (Dept. Ex. No. 3.), acknowledged his position of corporate president. Liability under the statute is not established by the mere holding of a corporate office, however, taxpayer has failed to put forth any competent evidence to prove that he was not actively involved in the company's financial decisions as might be expected of someone with his title and stature within the corporation. Therefore, TAXPAYER's contentions alone are insufficient to rebut the *prima facie* correctness of the NOD.

Pursuant to Illinois statute and case law, the NOD is *prima facie* correct and is *prima facie* evidence of the correctness of the amount of tax due, as shown therein. See, A.R. Barnes and Co. v. Department of Revenue, 173 Ill. App. 3d 826 (1st Dist. 1988). "In order to overcome the presumption of validity attached to the Department's corrected returns" the taxpayer "must produce competent evidence, identified with their books and records and showing that the Department's returns are incorrect." Copilevitz v. Department of

Revenue, 41 Ill. 2d 154 (1968); Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1st Dist. 1978). Oral testimony is not sufficient to overcome the *prima facie* correctness of the Department's determinations. A.R. Barnes & Co. v. Department of Revenue, *supra*.

Tax returns bearing TAXPAYER's signature and his corporate title of president were also introduced into evidence. In his letters, the taxpayer denies responsibility and claims that these signatures are either forgeries or an unauthorized use of the signature stamp. Again, TAXPAYER offers no competent testimony or documentation to prove these allegations. These claims alone are insufficient to rebut the Department's *prima facie* proof that TAXPAYER was a responsible officer who willfully failed to collect, truthfully account for and pay over the withholding taxes during the pertinent tax period.

Based upon the foregoing, I recommend that the Notice of Deficiency be finalized.

Christine O'Donoghue
Administrative Law Judge